IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ISMAEL GOMEZ, JR.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 13-cv-946-MJR-SCW**
	)	
UNITED STATES OF AMERICA, J.S. WALTON, M. WINKLMEIER, M. BAGWELL, LESLEE BROOKS, CASTILLO, DR. HARVEY, and DR. KING,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

REAGAN, Chief District Judge:

Pursuant to ***Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)**, 42 U.S.C. § 1985(2) and (3), and 42 U.S.C. § 1986, *pro se* Plaintiff Ismael Gomez, currently incarcerated at the United States Penitentiary in Marion, Illinois, claims various constitutional violations by the Defendants. Specifically, Plaintiff alleges that the Defendants were deliberately indifferent to his serious medical needs (Count 2), retaliated against him (Count 3), denied him proper medical treatment due to his race (Count 5), conspired to deny his right to equal protection (Count 6), conspired to obstruct justice (Count 7), and failed to withdraw from the conspiracies (Count 8).

This matter is currently before the Court on a summary judgment motion (Doc. 49) filed by Defendants Dr. Harvey and M. Bagwell, and identical motions to dismiss Counts 6-8 (Docs. 48, 54, and 66) filed by Defendants J.S. Walton, M. Bagwell, Leslee

Brooks, Castillo, Dr. Harvey, M. Winklmeier, and Dr. King. Plaintiff has filed responses to both motions (Docs. 67 and 60, respectively). For the following reasons, the Court **GRANTS** both the summary judgment motion and the motions to dismiss.

BACKGROUND

Plaintiff is currently a prisoner at the United State Penitentiary in Marion, Illinois. Plaintiff's first amended complaint, as narrowed by the Court's threshold order, alleges that he suffers from various ailments including arthritis; a pinched nerve affecting his neck, shoulder, and arms; a herniated disc; and neuropathy (Doc. 24, p. 2). Plaintiff alleges that these conditions leave him in pain that he rates as 6 to 8 on a 10 point scale (*Id*.). Plaintiff alleges that his sick-calls are ignored and that when he does meet with medical personnel they only give him a superficial examination.

Plaintiff also alleges that Defendants are denying him adequate healthcare due to his race. Plaintiff is Latino and Plaintiff alleges that non-Latino prisoners with similar ailments have received adequate treatment where he has been denied treatment. He also claims that the actions of Defendants are done out of retaliation and in conspiracy with one another (Doc. 24, p. 3). Plaintiff believes that Defendants are conspiring against him because he sees them huddled together when he is in the healthcare unit.

In response to Plaintiff's complaint, all of the Defendants have filed motions to dismiss the conspiracy claims (Docs. 48, 54, and 66). Defendants argue that Plaintiff has not adequately alleged a conspiracy in Counts 6-8 because he only alleges a conspiracy between members of the same entity. Further, Dr. Harvey and M. Bagwell argue that

they are immune from ***Bivens*** liability as they are members of the Public Health Service.

LEGAL STANDARDS

A. Summary Judgment Standard

Summary judgment is proper only "if the admissible evidence considered as a whole shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." ***Dynegy Marketing & Trade v. Multiut Corp.*, 648 F.3d 506, 517 (7th Cir. 2011) (*citing* FED. R. CIV. P. 56(a)).** A fact is material if it is outcome determinative under applicable law, and a genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." ***Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).**

The party seeking summary judgment bears the initial burden of demonstrating—based on the pleadings, affidavits, and the other information submitted—the lack of any genuine issue of material fact. ***Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).** After a proper motion for summary judgment is made, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." ***Anderson*, 477 U.S. at 250 (*quoting* FED. R. CIV. P. 56(e)(2)).** A mere scintilla of evidence in support of the nonmovant's petition is insufficient; a party will be successful in opposing the motion when it presents definite, competent evidence to rebut the motion. ***Szymanski v. Rite-Way Lawn Maintenance Co., Inc.*, 231 F.3d 360, 364 (7th Cir. 2000).**

On summary judgment, the Court considers the facts in the light most favorable to the non-movant, and adopts reasonable inferences and resolves doubts in the

non-movant's favor. ***Srail v. Vill. of Lisle*, 588 F.3d 940, 948 (7th Cir. 2009).** Even if the material facts are not in dispute, summary judgment is inappropriate when the information before the Court reveals that "alternate inferences can be drawn from the available evidence." ***Spiegla v. Hull*, 371 F.3d 928, 935 (7th Cir. 2004), *abrogated on other grounds by Spiegla II*, 481 F.3d at 966 (7th Cir. 2007).**

B. Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) governs motions to dismiss for failure to state a claim. Although a complaint need not contain detailed factual allegations to avoid dismissal, it must contain "enough facts to state a claim for relief that is plausible on its face." ***Scott v. Chuhak & Tecson, P.C.*, 725 F.3d 772, 782 (7th Cir. 2013).** A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." ***D.B. ex rel. Kurtis B. v. Kopp*, 725 F.3d 681, 684 (7th Cir. 2013).** Facial plausibility requires a claimant to "go beyond mere labels and conclusions" and allege "enough to raise a right to relief above the speculative level." ***G&S Holdings, LLC v. Continental Casualty Co.*, 697 F.3d 534, 537-38 (7th Cir. 2012).** Stated another way, "to withstand a Rule 12(b)(6) challenge," the plaintiff "must give enough details about the subject-matter of the case to present a story that holds together"—the question the district court should ask in addressing the motion is "*could* these things have happened, not *did* they happen." ***Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529, 533 (7th Cir. 2011).**

Courts "must still approach motions under Rule 12(b)(6) by construing the

complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in [his or her] favor.'" ***Hecker v. Deere & Co.*, 556 F.3d 575, 580 (7th Cir. 2009).** The court must take well-pleaded facts as true, but is not required to accept as true "statements of law" or "unsupported conclusory factual allegations." ***Yeftich v. Navistar, Inc.*, 722 F.3d 911, 915 (7th Cir. 2013).**

ANALYSIS

A. Public Health Service Immunity

Defendants Bagwell and Harvey argue that they should be dismissed from this action as they are immune from suit as officers of the Public Health Service. 42 U.S.C. § 233(a) indicates that the exclusive remedy for a claim against a member of the Public Health Service involving the performance of medical or related functions within the scope of employment is through the Federal Tort Claims Act and not a ***Bivens*** suit against the officer. ***See Hui v. Castaneda*, 559 U.S. 799, 809 (2010).** Defendants Bagwell and Harvey have offered an affidavit indicating that they are Public Health Service officers (Doc. 49-1, p. 2-3). Capt. George Durgin, the Service Corps Liaison, also testified by affidavit that both Bagwell and Harvey are Service officers (*Id.*). The two defendants also argue that their actions in treating Plaintiff's medical condition fell within the scope of their employment as Service officers. Plaintiff takes issue with the fact that Defendants are Service officers who are working for the Bureau of Prisons and does not think that it is right that he cannot hold them responsible for their denial of medications. But Plaintiff could pursue claims against the United States concerning

those officers through the Federal Tort Claims Act should Plaintiff properly bring a Federal Tort Claims Act claim.[1] Further, the Court finds no facts in the record to indicate that Defendants were acting outside of their administrative duties when they allegedly denied Plaintiff adequate medical care—a finding that could allow for a ***Bivens*** claim. Thus, this Court finds that it does not have subject matter jurisdiction over Bagwell and Harvey and will dismiss them with prejudice from this case.

B. Conspiracy Claims

All of the Defendants also seek to dismiss Plaintiff's conspiracy claims in Counts 6-8 as those claims allege a conspiracy among the individual defendants under 42 U.S.C. § 1985 and 1986. Defendants argue that these claims are barred under the intracorporate conspiracy doctrine. Under that doctrine, a § 1985 conspiracy claim "cannot exist solely between members of the same entity." ***Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 184 F.3d 623, 632 (7th Cir. 1999).** "[T]he function of a conspiracy claim under § 1985(3) is to permit recovery from a private actor who has conspired with state actors." ***Turley v. Rednour*, 729 F.3d 645, 649 n.2 (7th Cir. 2013).** In this case, all of the Defendants which Plaintiff alleges conspired together were employees at the United States Penitentiary in Marion, Illinois. As they are all employees of the same entity, they cannot be sued under § 1985 for conspiracy. ***Payton*, 184 F.3d at 632; *Wright v. Ill. Dep't of Children and Family Servs.*, 40 F.3d 1492, 1508 (7th**

[1] Plaintiff attempted to bring a claim under the Federal Tort Claims Act against the United States but Plaintiff failed to file the certificate required by 735 ILCS 5/2-622(a), so that claim was dismissed without prejudice at screening (*See* Doc. 24, p. 5-6).

Cir. 1994). Plaintiff's claim under § 1986 must also fail as such a claim lacks merit when a plaintiff fails to state a claim under § 1985. ***Smith v. Gomez*, 550 F.3d 613, 617-18 (7th Cir. 2008); *Hicks v. Resolution Trust Corp.*, 970 F.2d 378, 382 (7th Cir. 1992) ("in the absence of a viable claim under § 1985(3), a § 1986 claim cannot exist").** Accordingly, counts 6-8 will be dismissed with prejudice against all of the Defendants.

CONCLUSION

For the reasons stated above, the Court **GRANTS** the summary judgment motion (Doc. 49) filed by Defendants Dr. Harvey and M. Bagwell and **GRANTS** the identical motions to dismiss Counts 6-8 (Docs. 48, 54, and 66) filed by Defendants J.S. Walton, M. Bagwell, Leslee Brooks, Castillo, Dr. Harvey, M. Winklmeier, and Dr. King. The Court **DISMISSES with prejudice** Counts 6-8 as to all Defendants and **DISMISSES with prejudice** all of the claims against Dr. Harvey and M. Bagwell.

IT IS SO ORDERED.

DATED: March 10, 2016

/s/ **Michael J. Reagan**
Chief Judge Michael J. Reagan
United States District Court